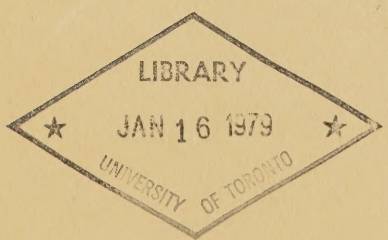
Ontario

Commission on Freedom of Information and Individual Privacy

Freedom of Information and Ministerial Responsibility



Research Publication 2

FREEDOM OF INFORMATION AND MINISTERIAL RESPONSIBILITY

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Research Publication 2

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and
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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the Government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the Government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the Government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of Government information;

3. The categories of Government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of Government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of Government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 2. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the Province a good turn in having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The freedom of information debate which has developed in the past few years in Canada, Australia and the United Kingdom has stressed the importance of assessing carefully the differences between the parliamentary system and the constitutional structure of other jurisdictions, notably the United States and Sweden, which have adopted open government laws.

It is quite appropriate, then, that the terms of reference of this Commission indicate that consideration is to be given to possible changes in public information practices that are "compatible with the parliamentary traditions of the Government of Ontario".

A central feature of the parliamentary system of government is the responsibility of Ministers for the execution of government policy and their direct accountability to the Legislature. There is much disagreement, however, as to the implications of this doctrine of ministerial responsibility for the information access question. Would a legislated right of citizen access to government information undermine or, indeed, be inconsistent with the convention of ministerial responsibility?

Many who counsel caution in these matters have raised concerns that this traditional mechanism of government accountability would be weakened by overly aggressive freedom of information laws. Advocates of more open government, on the other hand, have argued that the doctrine of ministerial responsibility is not incompatible with legislated rights of access to government information.

Against this background, it was determined that the Commission would be assisted in its work by the preparation of a research paper which would attempt to assess the current status of this doctrine and weigh dispassionately its implications for the freedom of information issue. Professor Kernaghan has undertaken this task. He is a Professor of Politics and Administration at Brock University in St. Catharines, Ontario, and has published extensively on topics related to the subject of this paper.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. Those who wish to communicate their views in writing to the Commission are invited to write us at the following address:

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It should be emphasized, however, that the views expressed in this paper are those of the author and that they deal with questions on which the Commission has not yet reached a final conclusion.

John D. McCamus
Director of Research

FREEDOM OF INFORMATION AND
MINISTERIAL RESPONSIBILITY

TABLE OF CONTENTS

FREEDOM OF INFORMATION AND MINISTERIAL RESPONSIBILITY

INTRODUCTION

This study is based on the premise that contemporary democratic governments should provide improved access to government information. The case for more open government has been persuasively made and freedom of information legislation has either been adopted or is under active consideration at both the federal and provincial levels of Canadian government and in several other countries. Thus the Ontario government can benefit from experience and proposals in other jurisdictions in its efforts "to improve public information policies and relevant legislation and procedures of the Government of Ontario..."[1]

The major freedom of information issue is the need to balance the public's right to know with the government's need to keep certain information secret. The closely related issue of individual privacy, involving the reconciliation of the government's need to know with the public's right to personal privacy, is outside the terms of reference of this study.

1 Order-in-Council establishing the Commission on Freedom of Information and Individual Privacy.

Knowledge and understanding of freedom of information practices and problems in other governmental jurisdictions suggest means by which the freedom of information issue may be resolved in the Ontario context. The Ontario legislation must, however, be formulated to meet the particular requirements of Ontario's political and administrative systems. In Ontario - as in other parliamentary governments - a foremost problem in drafting freedom of information legislation is reconciling improved access to government information with the constitutional convention of ministerial responsibility. Thus the primary focus of this study is on the relation between the convention (or doctrine) of ministerial responsibility and public access to official information. Ministerial responsibility is related both to the issue of exemptions, that is what classes of information should be excluded from disclosure, and the issue of review, that is what person or body should have final authority to decide what information should be disclosed. Each of these issues will be discussed later in this paper.

Throughout this paper, the term parliamentary government refers to that form of parliamentary government based on the Westminster model which developed in Britain and which has been adopted in Commonwealth countries.

This study is divided into two major sections. The first section examines the evolution and current state of the doctrine of ministerial responsibility and its relation to administrative responsibility

and political neutrality. The second section discusses ministerial responsibility and freedom of information with particular reference to the matters of exemptions and review. This second section contains a comparative description and analysis of relevant aspects of freedom of information policies or proposals in Sweden, the United States, Britain and Australia and in Canada at the federal and provincial levels of government.

CHAPTER I

MINISTERIAL RESPONSIBILITY

Before examining the implications of ministerial responsibility for freedom of information legislation, it is essential to describe the current state of ministerial responsibility in the Canadian political system. Confusion and disagreement over the meaning and implications of ministerial responsibility have severely impeded rational discussion of the desirability and feasibility of freedom of information legislation in parliamentary systems of government.

Recent debates over the appropriate application of the convention of ministerial responsibility have received much publicity. A significant number of politicians, journalists and academics have announced or called for the demise of ministerial responsibility. A sample statement from each of these three groups will demonstrate the strength of their conviction on this matter:

> "... the whole doctrine of Ministerial responsibility is only a convention, an unwritten rule that tends to shift and change over time and recent events have demonstrated this convention is now but a myth." [2]

2 Gerald Baldwin, "Freedom of Information: Another Personal View", Canadian Political Science Bulletin, vol. 7, January 1978, p. 63.

> "...the tradition of dumping on politicians as if they are responsible for everything and letting civil servants get off scot-free is out of date, and indeed has been obsolete for decades." [3]

> "In practice, except in the last resort, Parliamentary history has completely nullified the theoretical underpinnings of ministerial responsibility." [4]

Although these assertions are overstated or inaccurate in some respects, the general thrust of the authors' argument is accurate if one accepts their narrow interpretation of ministerial responsibility. They view ministerial responsibility quite simply as requiring that ministers bear personal responsibility for all the acts of their departmental subordinates and that ministers must resign in the event of a serious administrative error by their department. This restrictive understanding of ministerial responsibility obscures the full meaning of the convention.

The critics quoted above and many other commentators on ministerial responsibility treat one part of the convention - admittedly a central part of it - as the whole of the convention. Pronouncements on the actual or impending death of ministerial responsibility constitute a classic case of "throwing the baby out with the bathwater". They ignore the fact that ministers, both individually and collectively, continue to be required by the convention to answer to the legislature for the activities of government departments. The error is a very serious one

3 Richard Gwyn, Ottawa Citizen, June 8, 1976.

4 T. Murray Rankin, Freedom of Information in Canada: Will the Doors Stay Shut?, The Canadian Bar Association, 1977, p. 112.

since the convention of ministerial responsibility is a central convention of the Canadian constitution and it is the central convention affecting the conduct of the public service. It is therefore integrally related to the concept and practice of administrative responsibility. Moreover, the state of ministerial and administrative responsibility affects and is affected by the evolution of the conventions of political neutrality and public service anonymity.

The traditional doctrine of political neutrality requires that politics and policy be separated from administration; that public servants be appointed and advanced on grounds of merit rather than partisanship; that public servants do not participate in partisan politics; that public servants provide confidential advice to ministers; that ministers protect the anonymity of public servants; and that public servants serve the government loyally regardless of their personal opinions. In this paper, public service anonymity will be treated as an integral part of the doctrine of political neutrality. It will become evident in subsequent discussion that in practice significant departures are made from the traditional doctrine.[5]

Although popular and political discussion of ministerial responsibility tends to centre on individual rather than collective ministerial responsibility, collective responsibility has important implications

5 For a full discussion of the evolution of the doctrine of political neutrality, see Kenneth Kernaghan, "Policy, Politics and Public Servants: Political Neutrality Revisited", Canadian Public Administration, vol. 19, Fall 1976, pp. 432-456.

for the freedom of information issue. Collective ministerial responsibility has two major elements. The first relates to the government as a whole and requires that the Prime Minister and the Cabinet must either resign or seek dissolution of Parliament if the government loses support of a majority in the House of Commons. The second relates to individual ministers and requires that each minister support government policies before Parliament and the public. If a minister disapproves of a specific government policy, he must either suppress his dissent or resign from the Cabinet. The relation between collective ministerial responsibility and public access to official information will be discussed later. The major concern of this paper, however, is with individual ministerial responsibility. Thus, unless otherwise specified, subsequent references to ministerial responsibility will be to individual ministerial responsibility.

The traditional doctrine of individual ministerial responsibility has two major components, namely:

1) The minister is answerable to the legislature in that he must explain and defend the actions of his department before the legislature, and

2) The minister is answerable to the legislature in that he must resign in the event of serious personal misconduct. He is also answerable for the administrative failings of his departmental subordinates in that he must resign in the event of a grave error by his department. "The act of every Civil Servant is by

convention regarded as the act of his Minister."[6]

This doctrine has two corollaries which link it closely with the conventions of public service anonymity and political neutrality, namely:

1) Public servants are not directly answerable to the legislature. "...the Minister alone speaks for his Civil Servants to the House and to his Civil Servants for the House,"[7] and

2) The minister protects the anonymity of public servants by shielding them from public identification and public censure. Public servants protect their own anonymity by refraining from partisan activity or public criticism of government.

These four statements of the conventional relations among ministers, legislators and public servants will be utilized as a framework for discussion in this paper of the current state of the doctrine of individual ministerial responsibility and its links with the doctrine of political neutrality.

6 Sir Ivor Jennings, Law and the Constitution, London, University of London Press, 1952, 4th ed., pp. 189-190.

7 S. E. Finer, "The Individual Responsibility of Ministers", Public Administration, vol. 34, Winter 1956, p. 394.

The Answerability of Ministers

The principle that ministers must answer to the legislature in that they must explain and defend the actions of their departments before the legislature is well-established in Canada. The extent to which the principle is established in practice has been demonstrated by the outrage directed toward a minister who departs - or appears to depart - from the principle. For example, a few days after Jean-Jacques Blais became Canada's Solicitor General on February 1, 1978, members of the Opposition parties understood him to say both inside and outside the House that his ministerial responsibility began on the date of his appointment and that he would not answer questions on matters that were under consideration by the Royal Commission on Security. In response to vigorous Opposition protests, the Speaker of the House ruled that "if the minister says his responsibility goes back to the date of his appointment, he may be correct in referring to some direct responsibility so far as defalcations in the department are concerned, but he is incorrect if he is referring to the informational responsibility to receive questions in the House in connection with that particular department."[8]

In regard to the conventional practice that the incumbent minister must answer to the legislature for the administration of his predecessors, Prime Minister Trudeau stated that "the government as a

8 Debates (Commons), February 6, 1978, p. 2566.

whole is responsible for things which happen or things that do not happen during its terms of office. A change of cabinet ministers from time to time does not allow the government to escape the duty and obligation of answering for its administration."[9] This practice is also supported by rulings of the Speakers of the House of Commons. The current Speaker ruled as follows:

> "Can members ask a question of a minister in that minister's former capacity? The clear answer given time and time again, without any doubt about their practices and precedents, has been no. It is tied very directly to the theory of ministerial responsibility, that the present incumbent of a ministerial office has responsibility which goes back for all time. Therefore there cannot be two people responsible to the House in the parliamentary sense for that continuing responsibility." [10]

Thus a minister who has moved to another portfolio or has left the Cabinet or the legislature is not obliged to answer to the legislature for the administration of a department for which he is no longer the minister. The purpose of this practice is clear. It focusses responsibility for the administration of each department on a single minister and thereby helps to avoid diffusion and evasion of responsibility. The practice is especially important when there has been a frequent turnover of ministers holding a particular portfolio since the current minister may have to answer for several predecessors. In such situations, the continuity of administration provided by the permanent public service is very significant. The minister is obliged

9 Debates (Commons), February 6, 1978, p. 2558.

10 Ibid., June 20, 1977, p. 6851.

to rely solely or heavily on information and explanations provided by public servants whose tenure has bridged that of two or more ministers.

In regard to the apparent refusal of Mr. Blais to answer questions in Parliament on matters being examined by the Royal Commission on Security, the rule is clear that a minister cannot be required to answer a question in the legislature.[11] Nor can he be compelled by the Speaker to provide grounds for his refusal. The minister - and the government - may, however, pay a significant political price for declining to answer questions in the legislature. According to the Speaker, "... in the final analysis, the Chair is not in a position to compel an answer - it is public opinion which compels an answer."[12]

Even if a minister decides to answer a question - as he almost invariably does - there is much disagreement as to what answer constitutes a reasonable, appropriate and acceptable explanation of his own or his department's activities. It is well known that ministers' responses to questions are often characterized more by obfuscation and evasion than by clarity and forthrightness. Opposition members strive to make political capital by exposing or suggesting ministerial or bureaucratic incompetence whereas ministers strive to reject or refute such allegations.

11 Arthur Beauchesne, Rules and Forms of the House of Commons of Canada, Toronto, Carswell, 1958, 4th ed., sec. 181. (3), p. 153.

12 Debates (Commons), February 6, 1978, p. 2567.

Despite these obstacles to obtaining a full response to questions in the legislature, there is no doubt that ministers are expected to answer for their departments. Ministers who refuse to answer questions or who provide insubstantial evidence or evasive answers may suffer adverse political consequences. Oral questions to ministers, especially in the Ontario legislature where the Question Period is often a free-wheeling and sometimes a raucous debate, put a formidable political weapon in the hands of Opposition parties.

The Resignation of Ministers

It is well-established practice in Canada that ministers will resign if they become involved in scandalous, illegal or unethical conduct which is too embarrassing politically for the government to bear. Beyond this area of agreement there is much political and scholarly debate over the circumstances which require the resignation of ministers. The debate revolves around the extent to which ministers should be held personally responsible in the form of resignation or demotion for serious administrative errors by their department.

A rigid interpretation of the convention of ministerial responsibility requires that ministers should resign in the event of grave administrative transgressions by their departmental subordinates. In Canada, as well as in Britain and Australia, this extreme view has

been generally rejected. Ministers do not normally resign as a consequence of the misdeeds of their public servants. S. E. Finer reported that in Britain between 1855 and 1955, only twenty ministers resigned as a result of Parliament's criticism of the administration of their departments - "a tiny number compared with the known instances of mismanagement and blunderings."[13]

It is wrong to conclude, however, that there are no circumstances under which a minister may be required to resign as a result of maladministration in his department. If it can be shown that a minister either directed or had personal knowledge of the events in question, the Opposition parties will insist on his resignation. Moreover, the government may well accede to this insistence if the political cost of keeping the minister in the government is too great. A minister under Opposition attack would clearly be more vulnerable if his government was in a minority position in the legislature.

A committee composed of federal senior public servants recently summed up the minister's responsibility in these words:

> "... a Minister is subject to various degrees of responsibility. He must certainly accept full responsibility for matters done properly under his instructions or in accordance with his policy. However, in the case of a problem not affecting an important question of policy, he is generally thought to have met his responsibility if he takes the matter in hand ... He cannot be acquainted with, or personally criticized for, every detail of administration in his department. However, he is expected to

13 S. E. Finer, "Individual Responsibility of Ministers", p. 390.

> be responsive to individual cases and to see that individual wrongs are righted." [14]

It would, of course, have been inappropriate for the members of this committee to explore the political implications of their statement on ministerial responsibility. It is notable, however, that it is very difficult in practice to determine whether certain matters were "done properly under his (the minister's) instructions or in accordance with his policy." Indeed it is often difficult to get the minister to admit that a mistake has been made, especially one that could reasonably have been avoided. Even if the minister acknowledges the existence of administrative error, he normally - and understandably - denies personal knowledge or involvement. In some cases, he lays the blame on his public servants - usually without naming them - and he promises the legislature that the culpable parties will be disciplined and the error remedied.

In some cases, however, a gap occurs or appears to occur in the government's responsibility to the legislature and the public. On some occasions, the minister may not only refuse to accept personal blame but may also decline to blame his administrative subordinates. This appears to have been the practice in two celebrated Canadian cases of maladministration at the federal level of government, namely The Foot and Mouth Disease Epidemic (1951-1953) and the Bonaventure

14 Government of Canada, Report of the Committee on the Concept of the Ombudsman, Ottawa, July 1977, p. 16.

Refit (1966-1970). In these cases, Opposition members requested ministerial resignations but it was evident that the blame lay with public servants. In both cases, the identity of the public servants involved was made known through the investigations of parliamentary committees but no promises of administrative discipline were given by the responsible ministers. In instances such as the Orion Dispute (1975-1978) and the RCMP Security Affair (1977-), where ministerial culpability is a more open question, the fate of the minister depends to a large extent on partisan and personal considerations. If the government perceives that its electoral fortunes will not be significantly threatened by the allegations of Opposition members concerning ministerial responsibility or if the minister under attack has high standing in the government, the Cabinet collectively will close ranks to protect the minister. In this event, collective ministerial responsibility supersedes individual responsibility.

Thus an actual or apparent gap in responsibility occurs when neither ministers nor public servants are seen to be held responsible in the formal sense of resignation or other forms of discipline. Nevertheless, less formal sanctions can be applied in that ministers may later be quietly moved to less prestigious portfolios and the promotion prospects of public servants may be adversely affected. The doctrine of ministerial responsibility serves to focus legislative and public concern on ministers or on the Cabinet to their individual or collective embarrassment.

An important additional consideration regarding the resignation of ministers relates to their responsibility for the acts of their predecessors. Although the present minister of a department is required to answer for previous ministers in the sense of explaining or defending departmental actions, it is unrealistic to expect the current minister to resign for errors committed during the administration of his predecessors. For example, in regard to the possible culpability of a specific minister, Prime Minister Trudeau asserted that "if the Royal Commission of Inquiry finds that some previous solicitor general did something wrong it will not blame the present Solicitor General... of course the government as a whole will be responsible for acts committed during the time of its administration."[15] In regard to the responsibility of the current minister for administrative errors committed by public servants under a previous minister, the Speaker of the House of Commons has ruled that

> "... the direct administrative responsibility to parliament of any minister for the department cannot go back prior to the date of his appointment... If it turns out that the evidence discloses that a civil servant in that department has somehow been misinformed or has been guilty of misconduct for which the minister has to direct an apology to parliament, surely the minister cannot be called upon to resign."[16]

The active role of the public service in policy development and implementation reinforces the difficulty of requiring the resignation

15 Debates (Commons), February 6, 1978, p. 2560.

16 Ibid., p. 2566.

of ministers for the misdeeds of public servants. The large size of government departments together with the volume and complexity of their activities mean that ministers cannot reasonably be expected to have personal knowledge of more than a very small proportion of the acts carried out in their name. Ministers depend on their public servants for advice on the probable administrative, financial, technical and even "political" implications of major policy decisions. Moreover, public servants make decisions with far-reaching consequences under authority delegated to them by the legislature, Cabinet and individual ministers.

The Answerability of Public Servants

The convention of ministerial responsibility requires that ministers, not public servants, take responsibility before the legislature and the public for policy decisions and departmental administration. The minister is the formal constitutional link between the legislature and his departmental subordinates. Thus public servants do not answer directly to the legislature; rather the minister conveys information to the legislature on behalf of his public servants and in his own name.

There has, however, been a gradual evolution towards more direct answerability of public servants, not to the legislature as a whole but to legislative committees. An important effect of reforms in the legislative committee system in both the federal and Ontario governments

has been a substantial increase during the past decade in the appearances of public servants before legislative committees. In both jurisdictions public servants now testify much more frequently on departmental estimates and government bills.

The doctrines of ministerial responsibility and public service neutrality require that in legislative committees ministers answer questions requiring the defence of government policies and public servants answer questions requiring the explanation of the substance and administration of policies. Both politicians and public servants are aware, however, that the lines between policy and administration and between the defence and the explanation of policy are frequently indistinguishable. Thus the participation of public servants in legislative committees often reveals their actual or probable contribution to the development of specific policies and to the policy process in general. Although public servants normally strive to preserve the appearance of ministerial dominance in policy making, a few public servants have provided remarkably frank accounts of their influence on the development of certain policies. It is important to remember that in their contacts with legislators, especially with members of Opposition parties, the public servants' first loyalty is to their minister. In this respect, J. W. Pickersgill, a long-time federal Cabinet minister, stated that "while bureaucrats should not be partisan, they do not have the right to be neutral between government and opposition. Public servants owe loyal service to the government in

office whether they like its politics or not."[17]

Another important aspect of the answerability of public servants is that they are not permitted to respond publicly to allegations of maladministration, whether the source of these allegations is Opposition members, journalists or individual citizens. The minister speaks to the legislature and to the public on behalf of public servants under attack. The extent of the minister's defence of his officials depends upon the nature and legitimacy of the allegation.

In cases of either actual or alleged maladministration, however, public servants have traditionally appeared before legislative committees to explain or defend their decisions or recommendations. Public servants can usually count on their minister to protect them against attacks both in committees and in the legislature. Public servants may, however, be named and blamed by other participants in the political process. In the well-known Bonaventure Refit case, the report of the Public Accounts Committee identified and found fault with several senior officials but their ministers defended them in Parliament. In other instances, the names and activities of public servants have been uncovered and publicized by the media.

17 "Bureaucrats and Politicians", Canadian Public Administration, vol. 15, Fall 1972, p. 426.

The nature of future relations between public servants and legislators depends largely on the evolution of the intertwined doctrines of ministerial responsibility and political neutrality. It is probable that the willingness and capacity of ministers to answer satisfactorily to the legislature for departmental administration will decline. The significant role of public servants in the political process has already been established. These developments may well lead to strong agitation to find means by which legislators may hold public servants more strictly and directly accountable for their activities.

The Anonymity of Public Servants

Preservation of the anonymity of public servants depends to a large extent on adherence to the conventional notions of ministerial responsibility and political neutrality already discussed. A decline in the answerability of ministers and a rise in the answerability of public servants clearly diminish public service anonymity.

Ministers are expected to help preserve and protect the anonymity of public servants by refraining from naming and blaming (or praising) them in public and by defending them against attacks made by other actors in the political process, especially Opposition members of the legislature. As a quid pro quo, public servants are expected to maintain their own anonymity by avoiding participation in partisan politics and abstaining from critical or speculative comment in

public on government policies and programs. Thus, the state of public service anonymity is closely tied to the doctrines of ministerial responsibility and political neutrality.

Recent practice by some ministers has created uncertainty among public servants as to what measure of ministerial protection of public service anonymity they can expect. A few years ago a federal minister, speaking outside the House of Commons, described a report published by his department and written by one of his officials as "a shabby piece of research". The minister stated also that the conclusions of the report were "stupid". On behalf of the official, the Professional Institute of the Public Service requested an apology from the minister and summed up the traditional responsibility of a minister to his public servants as follows:

> "The Professional Institute is concerned that you, a Minister of the Crown, should apparently see fit to attack publicly in such offensive and opprobrious terms, a public servant who has no means of defending himself... A Minister of the Crown assumes responsibility for the activities of his Department and the work of his employees... It would be a most unhealthy situation if professional public servants were afraid to perform their duties fully and honestly, through fear of having their professional reputations and careers blasted in public, particularly by those in authority over them." [18]

The minister refused the Institute's request and Opposition demands for an apology. The public servant under attack respected conventional

18 "The Case of Dr. Usher", Professional Public Service, May 1972, pp. 27-28.

practice by resisting the temptation personally to challenge the minister's remarks in public.

In another more recent and more celebrated case of a federal minister naming and blaming a departmental official, the public servant responded differently to his minister's attack. The minister, during his criticism of the official in the House of Commons, said

> "... I will stand by my officials and I accept responsibility for errors of judgment, mistakes made in good faith and inadvertent errors. But I do not believe that ministerial responsibility extends to cases of misinformation or gross negligence." [19]

The minister repeated this statement to reporters outside the House and added that he didn't have any confidence in the official. The public servant requested that the minister retract his remarks and when the minister refused this request, the public servant sued him for libel.

In regard to the minister's statement in the House, Mr. Justice Lieff of the Ontario Supreme Court ruled that "the proceedings of a legislative body are absolutely privileged and words spoken in Parliament can neither form the basis of nor support either a civil action or a criminal prosecution".[20] In regard to the minister's remarks outside

19 Debates (Commons), June 1, 1976, pp. 14030-14031.

20 Lawrence H. Stopforth and Jean-Pierre Goyer, typed version of decision, April 13, 1978, p. 14.

the House, the ruling of Mr. Justice Lieff is worth quoting:

> "It is a long standing convention of parliamentary democracy and the doctrine of ministerial responsibility which it encompasses that civil servants are to remain faceless to the public. Civil servants are responsible to their ministers. Ministers, as elected officials, are responsible to the public... Furthermore, it is my view that no matter how advanced the state of erosion of public service anonymity... a minister should not be able to blame or castigate personally any civil servant of a department under his control in public and then fall back upon the legal defence of qualified privilege. If that were the case and the civil servant were defamed he would be in the peculiar position of being prevented from obtaining vindication for spurious allegations by a minister." [21]

The Court awarded damages to the public servant in the amount of $10,000.00.

The decision in this case will not necessarily prevent ministers from identifying and attacking public servants in the course of remarks made in the legislature; however, it will certainly discourage ministers from repeating such attacks in public. It is notable also that in addition to the adverse court decision, the minister in this case suffered political embarrassment as a result of Opposition and media criticism of his attacks on a departmental official.

As noted earlier, the names of public servants alleged to be involved in misconduct or maladministration have in some instances been revealed by parliamentary committees or by the news media. The minister cannot easily prevent such situations but he can and usually does resist such inroads on official anonymity.

21 Ibid., pp. 21-22.

The evolution of the doctrine of political neutrality has also had a significant effect on the anonymity of public servants. The relaxation in some jurisdictions of the long-standing restraints on partisan political activity by public servants has increased the visibility of a small number of politically active officials. The greatest incursion on official anonymity, however, has resulted from the need for public servants increasingly to engage in public comment as a normal part of their duties. Public servants now appear frequently in public forums, on behalf of their ministers, to explain government policy and its administration and to receive complaints about government activities. Most public servants strive to retain their political neutrality but the line between policy and administration is often difficult to maintain. Thus, not only does the identity of public servants become known to the public but on occasion their personal views on policy issues may be perceived. Reference has already been made to a similar development resulting from public service participation in the meetings of legislative committees. Finally, as a result of the acknowledged influence of public servants in the political process and of their more frequent appearances in public and before legislative committees, the news media give greater publicity to their activities and official anonymity is further reduced.

It is evident that official anonymity is gradually declining despite the efforts of most ministers and public servants to resist this development. This reduction in anonymity has not to this date been primarily a result of occasional refusals by ministers to protect

official anonymity. There is no doubt, however, that lapses in ministerial responsibility help to reinforce a decline in anonymity resulting from other changes in the political system.

Conclusions

The practice of ministerial responsibility and political neutrality has evolved in response to changes in the Canadian political and administrative systems. As a result, the current state of the doctrine of ministerial responsibility and of its relation to the doctrine of political neutrality may be reformulated as follows:

1) The minister is answerable to the legislature in that he must explain and defend the actions of his department before the legislature.

2) The minister is answerable to the legislature in that he must resign in the event of serious personal misconduct. He is not usually answerable for the administrative failings of his departmental subordinates in the sense that he must resign in the event of a grave error by his department.

3) Public servants are not directly answerable to the legislature proper but they have become more answerable to legislative committees.

4) The minister usually protects the anonymity of public servants by shielding them from public identification and public censure. Public servants usually protect their own anonymity by refraining from partisan activity or public criticism of government.

It is clear that ministerial responsibility does not provide a comprehensive system of assuring responsibility in government. Experience in Canada and in other Commonwealth parliamentary governments has shown that ministers will not normally accept personal responsibility for the acts of their departmental officials. The act of every public servant is not regarded as the act of his minister. Moreover, there has been some reduction in the political neutrality of public servants and an increase in their answerability to the legislature and the public.

Thus, ministerial and administrative responsibility are tightly bound up together. For a comprehensive and comprehensible system of government responsibility to exist, either ministers or public servants - or both - must answer to the legislature and the public for all government actions. If ministers do not answer for the administration of their departments, the burden of responsibility either falls on public servants or it is borne by no one. If neither ministers nor public servants can be held responsible for administrative action, a critical gap occurs in government responsibility. However, public servants have traditionally been constrained and protected from direct answerability by the inter-dependent doctrines of ministerial responsibility and political

neutrality. Public servants are accountable first and foremost to their minister; any direct public service answerability to the legislature or to the public proceeds only with explicit or implicit ministerial permission. Moreover, public servants are expected to retain their anonymity and partisan impartiality and to avoid public comment on politically controversial matters so that they may be assured of security of tenure.

A shift in the burden of responsibility from ministers to public servants will bring public servants increasingly into the public spotlight where they will be obligated to defend their decisions and recommendations in the penetrating glare of publicity. Notions of anonymity, partisan impartiality and official reticence in public comment would be pared down considerably. Public servants would become - or appear to become - more political in the partisan sense and a turnover of senior public servants would tend to follow a change in the governing party.

Many critics of ministerial responsibility seem unaware of the serious constitutional, political and administrative implications of the rejection or even the major revision of the doctrine. And few critics proffer a reasoned and feasible alternative to ministerial responsibility. Despite its opponents, ministerial responsibility remains a central and essential feature of our political system. Moreover, despite the significant role of public servants in the political process, both politicians and public servants strive to retain so far as possible

the fact and the appearance of a politically neutral public service.

There is no doubt, however, that while the focus of responsibility in government continues to be primarily the minister, the locus of actual responsibility lies increasingly in the public service. The doctrines of ministerial responsibility and political neutrality are evolving to take account of this fact. It is likely that direct administrative answerability to the legislature and the public will increase. A new balance will be struck between ministerial and administrative responsibility. But the process will be one of gradual evolution, not radical change. The doctrine of ministerial responsibility will not cease to exist; rather it will be complemented by new procedures and practices which will expand administrative responsibility.

Evidence of the dilution of the traditional doctrines of ministerial responsibility and political neutrality can be found in both the federal and provincial spheres of Canadian government. It is important to note, however, that this dilution is not as far advanced in Ontario as it is in the federal sphere. Ontario's Deputy Attorney General rejects the view of those who contend that "ministerial responsibility and a professional, anonymous, non-partisan civil service no longer exist...as key features of our system"[22] in Ontario. He argues that

22 H. Allan Leal, Notes for a Submission by the Deputy Attorney General to the Commission on Freedom of Information and Individual Privacy, February 1978, p. 3.

despite the more frequent appearances of public servants before legislative committees and at public meetings, "we continue to have an anonymous, non-partisan civil service".[23]

23 Ibid., p. 4.

CHAPTER II

MINISTERIAL RESPONSIBILITY AND FREEDOM OF INFORMATION

Many proponents of freedom of information legislation contend that the principle of secrecy upon which parliamentary governments of the Westminster type operate should be reversed. The existing principle is that all government information is secret unless the government decides to release it; the reverse principle is that all government information should be released unless the government can make a good case for keeping it secret. Under this latter approach the burden on the public of justifying requests for the disclosure of information would be lifted; the burden of justifying non-disclosure of information would be imposed on the government, specifically on ministers and public servants.

Sweden and the United States

As evidence that a reversal of the principle is both desirable and feasible, advocates of more open government point to the models provided by Sweden and the United States. It is useful therefore to describe briefly the freedom of information acts in these two countries.

Additional information on the Swedish and United States experience will be provided in a later discussion of exemptions and review.

In Sweden, the basic principle governing public access to official documents is the presumption that all government information is public unless provision has been made by law to keep it secret. Sweden has had freedom of information legislation since as early as 1766. The current version of this legislation is the Freedom of the Press Act of 1949 which forms part of the Swedish constitution. This Act states that "to further free interchange of opinion and general enlightenment, every Swedish citizen shall have free access to official documents... "[24] This right of access is subject to restriction in four areas:

1) "security of the realm and its relations with foreign powers",

2) "official activities for inspection, control or other supervision, or for the prevention and prosecution of crime",

3) to protect the legitimate economic interest of the State, communities and individuals", and

4) "the maintenance of privacy, security of the person, decency

24 Ch. 2, art. 1.

and morality".[25]

The Act also provides that "the specific cases in which official documents are to be kept secret... shall be closely defined in special legislation".[26] This legislation is provided by an ordinary act of Parliament passed in 1937 entitled Law on Curtailment of the Right to Demand Official Documents and popularly referred to as the Secrecy Law. This law contains forty-two sections covering about two hundred and fifty categories of documents which may be withheld from the public. The restrictions in Sweden on access to policy documents are greater than is popularly believed by many commentators on freedom of information.[27]

Despite these exceptions to disclosure, the extent of public access to official documents in Sweden is impressive to Canadian observers. Citizens identify the documents they want from a register of files available to the public. Professor Rowat observed to his amazement that "all incoming and outgoing documents and mail were laid out in a special press room in each department for an hour every morning for reporters to examine". If a reporter "wanted further information on

25 Ibid.

26 Ibid.

27 See Gordon Robertson, "Access to Government Documents", address to the Annual Conference of the Institute of Public Administration of Canada, Halifax, September 1976, pp. 5-6.

a case, he simply walked down the hall to look at the department's files".[28] Citizens may inspect or obtain a copy of documents which in Canada would be kept secret for thirty years.

The Swedish system of access places a considerable burden on public servants to produce information promptly. When a citizen requests a document, the public servant who has custody of it must make it available "immediately or as soon as possible" if it is not exempt from disclosure. If the public servant is uncertain as to the status of a particular document, he may consult his superiors "provided that this is possible without undue delay". If a citizen's request for a document is refused, the citizen may appeal to the public servants' superiors, to the Ombudsman or to the Supreme Administrative Court. The possibility of disciplinary action, censure or prosecution inclines the public servant toward a prompt and liberal practice of disclosure.

The United States Freedom of Information Act, which came into force in 1967 and was significantly amended in 1974, is broadly similar to the Swedish Act. The former practice in the United States of disclosing information on a "need to know" basis has been replaced by a "right to know" policy. Officials are required to grant access to all government information except those classes of documents specifically exempted from disclosure by the Act.

28 D. C. Rowat, "We Need a Freedom of Information Act", address to the Annual Conference of the Institute of Public Administration of Canada, Halifax, September 1976, p. 3.

The documents which must be made available upon citizen request are:

1) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

2) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

3) administrative staff manuals and instructions to staff that affect a member of the public.

The nine classes of information which may be exempted from disclosure relate to:

1) secret information on national security and foreign relations;

2) internal personnel matters;

3) such documents as income tax returns which are exempted by statute;

4) trade secrets and commercial or financial information of a confidential nature;

5) confidential inter-agency or intra-agency memoranda or letters;

6) medical and personnel files and other personal information;

7) investigatory records compiled for law enforcement purposes;

8) records relating to the regulation of financial institutions; and

9) geological and geophysical information.[29]

Congressional committees which began an assessment of the Act in 1972 concluded that its efficient operation had been hampered by the "foot-dragging" of the civil service.[30] As a result, Congress

29 For a description of the interpretations of these exemptions, see David Johansen, Exemptions Under the U.S. Freedom of Information Act, Minutes of Proceedings and Evidence of Standing Joint Committee on Regulations and Other Statutory Instruments Respecting Green Paper on Legislation on Public Access to Government Documents, Issue no. 19, April 4, 1978, Appendix RSI-13, pp. 19A, 79-120.

30 For a detailed account of the Congressional evaluation and amendment to the Act, see Harold C. Relyea, "The Provision of Government Information: The Federal Freedom of Information Act Experience", Canadian Public Administration, vol. 20, Summer 1977, pp. 327-334.

amended the Act in 1974 to provide, among other things, strict rules on the administration of requests for information and disciplinary action against officials who arbitrarily or capriciously withhold information.

According to the Act, a request for information must "reasonably describe" the document(s) desired. Except under "unusual circumstances" an agency is required to make a decision on a request within ten working days of receiving it. The person making the request must be informed of the decision, the reasons for the decision, the name of the official who made the decision and the right to appeal the decision internally to the head of the agency. A decision on the appeal must be provided within twenty working days of its receipt. A person who is denied access to information may appeal to the United States District Court where the burden of proof is on the agency. If the Court finds in writing that an official has improperly withheld information, the Civil Service Commission is required to conduct an inquiry as to whether disciplinary action is warranted.

Since the amended Act came into effect in February 1975, a remarkable volume of information, some of which is very embarrassing to political executives and civil servants, has been released. A well-informed observer of the United States experience noted in 1977 that the Act had been opposed by the executive branch and "was regarded by the bureaucracy as an irritant and a threat to government operations... Today, a decade after its enactment, the Freedom of Information Act

seems to have been accepted by the majority of federal agencies to the extent that it is being efficiently and effectively administered by most executive branch entities".[31]

It is notable also that the Freedom of Information Act has been complemented by the Privacy Act of 1974 which came into effect in September 1975. The Privacy Act permits citizens to inspect and correct information contained in personal dossiers held by the government and restricts the circulation by agencies of information on individuals.

Many advocates of open government have recommended that freedom of information legislation based on the Swedish or the United States model be adopted in such countries as Canada, Britain and Australia. However, the existence of public access legislation in Sweden and the United States can be attributed in part to constitutional and political factors which differ both between these two countries and between each of these countries and other countries. It is instructive therefore to compare briefly the Swedish and United States governmental systems to parliamentary systems of the Westminster type. In the parliamentary systems, despite the evolution of the doctrines of ministerial responsibility and political neutrality described earlier, ministers remain collectively responsible to the legislature for government policy and individually responsible for the

31 Ibid., p. 341.

administration of their departments. Moreover, the primary responsibilities of public servants continue to be to advise ministers on policy and to implement policy decisions taken by ministers.

The Swedish system of government, with its Cabinet responsible to Parliament, is superficially similar to the Westminster model. Collective ministerial responsibility is operative in Sweden but with a few exceptions ministers are not individually responsible for the conduct of administration in their respective policy fields. The function of policy making is separated from that of program implementation. The ministers who make up the Cabinet head the policy-oriented ministries composed of a small number of public servants. The Cabinet and the legislature are responsible for the formulation of policy. The administration of policy is the responsibility of a large number of autonomous administrative boards where most of the country's public servants are employed. Ministers have authority "to see to the general running of their departments... but otherwise they bear no direct official responsibility for administration".[32]

In the United States, the concept of ministerial responsibility does not exist. There is a separation of powers between the executive and legislative branches of government. Cabinet members do not answer

32 Neil C. M. Elder, Government in Sweden: The Executive at Work, Oxford, Permagon Press, 1970, p. 45.

to the legislature on a day-to-day basis for the administration of their departments or for government policy as a whole. Thus in the United States, as in Sweden, the convention of ministerial responsibility presents no obstacle to the formulation and administration of freedom of information legislation.

Britain, Australia and Canada

Despite vigorous public agitation for freedom of information legislation and government studies of its feasibility in Britain, Australia and Canada, no parliamentary governments of the Westminster type, except Nova Scotia and New Brunswick, have passed a freedom of information act. The adaptation to parliamentary governments of laws and procedures on public access which exist elsewhere has proved to be a difficult undertaking. Some aspects of the policies and practices of Sweden and the United States may be adapted to the Ontario context but the public access system of neither country can be transplanted in Ontario soil.

The explanation for this situation lies largely in the fact that in a Commonwealth parliamentary system, freedom of information legislation must take account of the doctrines of ministerial responsibility and political neutrality. Understanding of the present state of these doctrines is therefore an essential basis for assessing the feasibility and content of public access legislation in parliamentary governments.

It is evident that abandonment of these doctrines would remove significant obstacles to the enactment of such legislation. It is equally clear, however, that despite the evolution of the doctrines described earlier and the inadequacy of a central component of ministerial responsibility, they remain a fundamental feature of our political and administrative systems. Proponents of freedom of information legislation cannot count on the disappearance or radical alteration of these doctrines. Their staying power rests in part on the firm resistance of ministers and public servants to developments, including proposed freedom of information legislation, which encroach on either ministerial responsibility or political neutrality.

Nevertheless, it is critical to note that several components of these doctrines have evolved in response to changes in political and administrative institutions and practices. There is very widespread feeling that the evolution of these doctrines can accommodate freedom of information legislation. The challenge to the Ontario government is to draft legislation - or adopt some other means - to improve public access to official information which will not depart too dramatically from accepted constitutional and political conditions. This is a challenge which not only Canada but also Britain and Australia have been struggling to meet. The experience and problems of these parliamentary governments is therefore generally more relevant to the Ontario situation than the Swedish and United States models.

In Britain, the Fulton Committee on the Civil Service, which reported

in 1968, observed that the administrative process "is surrounded by too much secrecy" and that "the public interest would be better served if there were a greater amount of openness".[33] The Committee acknowledged, however, that "there must always be an element of secrecy (not simply on grounds of national security) in administration and policy making". The Committee also suggested that the government "set up an inquiry to make recommendations for getting rid of unnecessary secrecy in this country" and that the Official Secrets Act be included in the inquiry's terms of reference.

In response to this proposal, the Labour Government published in 1969 a White Paper prepared by an interdepartmental committee and entitled Information and the Public Interest.[34] The White Paper reviewed the types and increased volume of information published by the government and noted the current tendency for government to consult more widely and openly before making decisions. In regard to the Official Secrets Act, the White Paper stated that much official information had to be protected from unauthorized release and that a criminal penalty was required to protect certain information from disclosure. Moreover, the White Paper did not view the Official Secrets Act as an obstacle to more open government because it did not restrict the authorized disclosure of information.

33 Cmnd. 3638, para. 277.

34 Cmnd. 4089.

During the 1970 election campaign, the Conservative Party promised to eliminate unnecessary secrecy in government and to examine the operation of the Official Secrets Act. After winning the election the Conservative Government established a Home Office Departmental Committee (the Franks Committee)[35] to inquire into the "operation of Section 2 of the Official Secrets Act 1911". Section 2 provides criminal sanctions for the unauthorized communication, receipt or retention of secret information. The Committee decided that the submissions it received relating to legislation "on the lines of Swedish and United States laws on public access to official documents... raised important constitutional questions"[36] beyond their terms of reference. It did, however, recommend, among other things, that Section 2 be repealed and replaced by an Official Information Act which would limit the use of criminal sanctions to unauthorized disclosures relating to defence and internal security, foreign relations, currency and the reserves, maintenance of law and order, Cabinet documents, and the confidence of the citizen (i.e. information given to the Government by private individuals or concerns).

Neither the White Paper nor the Franks Report responded directly and fully to the Fulton Committee's desire for an inquiry to enhance public access to government information. In November 1976, the

35 Report of Departmental Committee on Section 2 of the Official Secrets Act 1911, Cmnd. 5104.

36 Ibid., p. 35

Government informed Parliament that it accepted most of the recommendations of the Franks Committee but it brought forward no proposal relating to freedom of information legislation. An All-Party Committee on Freedom of Information set up during the same month has since prepared a Freedom of Information and Privacy Bill. This Parliamentary Committee is supported by a national campaign for Freedom of Information representing a wide variety of groups among the public.

Australia has progressed much further than Britain towards the enactment of freedom of information legislation. The Australian experience and proposals are therefore very instructive for other countries with parliamentary governments.

In 1972, the new Labour Government, which had promised "open government" during the election held that year, set up an interdepartmental committee "to identify the modifications required and any important issues involved in adapting the United States Freedom of Information Act to the Australian constitutional and administrative structure". The Committee's report was published in September 1974[37] but the Labour Government took no action on the report's recommendations before it left office in 1975. The new

37 Attorney-General's Department, Proposed Freedom of Information Legislation: Report of Interdepartmental Committee, Canberra, Australian Government Printing Service, September 1974, p. 1.

government reconvened the interdepartmental committee which published a lengthier report in December 1976.[38] This second report endorsed most of the recommendations of the first report and suggested some improvements. The Report of the Royal Commission on Australian Government Administration (the Coombs Report), also published in 1976, devoted a substantial section to an examination of freedom of information and appended a minority report containing a draft Freedom of Information Bill.

In view of the Committee's restricted terms of reference, it is not surprising that the legislation it recommended is broadly similar to the United States Freedom of Information Act. Its distinctive elements will be discussed later under the headings of exemptions and review. The major theme pervading the report, however, is a concern for the preservation of ministerial responsibility, both collective and individual, and of political neutrality. The Committee noted that "whatever might be the criticisms that are made of the theory of ministerial responsibility, any freedom of information legislation in the Australian context must take into account the special position of Ministers and the role, subordinate to that of the Ministers, of public servants".[39] The Committee also warned

38 Attorney-General's Department, Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee, Canberra, Australian Government Publishing Service, November 1976.

39 Ibid., p. 19.

that the legislation should not encourage the politicization of the senior public service by making public the advice and consultation flowing between ministers and public servants.[40]

On the basis of the second report of the Interdepartmental Committee, the Australian government drafted the Freedom of Information Bill 1978 which was introduced into Parliament on June 9, 1978.

In Canada, a series of significant developments beginning in 1965 has brought the federal Government close to the enactment of freedom of information legislation. During 1965, Professor D. C. Rowat published his landmark paper attacking the principle of administrative secrecy in Canada,[41] and Barry Mather, a New Democratic Party Member of Parliament, introduced a private member's bill on Government Administrative Disclosure.[42] The Reports of the Royal Commission on Security (Abridged)[43] and the Task Force on Government Information Services,[44] both of which were

40 Ibid., p. 18.

41 D. C. Rowat, "How Much Administrative Secrecy?", Canadian Journal of Economics and Political Science, vol. 31, November 1965, pp. 479-98.

42 Mr. Mather introduced this bill as a private member's bill each year from 1965 to 1970.

43 Canada, Report of the Royal Commission on Security (Abridged), Ottawa, Queen's Printer, 1969.

44 Canada, To Know and Be Known - Report of the Task Force on Government Information Services, Ottawa, Queen's Printer, 1969.

published in 1969, devoted small sections to the matter of administrative secrecy. However, neither Report had much impact in the way of improving public access to classified information.

Then, on March 15, 1973, the Liberal Government tabled in the House of Commons a Cabinet directive which required all departments and agencies to provide information to members of Parliament except where the information fell within the scope of sixteen enumerated exemptions.[45] (See Appendix A.) These guidelines, which are generally viewed by Opposition members and the media as too vague, too broad and too restrictive, are also used by the government to decide what information should be made available to the public. The guidelines were referred to the Standing Joint Committee of the House and Senate on Regulations and Other Statutory Instruments. In June of the same year, another Cabinet directive confirmed the "thirty-year rule" in effect since May 1, 1969[46] by requiring all departments and agencies "to implement the policy of making available to the public as large a portion of the Public Records of the Canadian Government as might be consistent with the national interest".[47] In late 1974, a private member's bill on

45 Cabinet Directive No. 45, "Notices of Motion for the Production of Papers".

46 See statement by Prime Minister Trudeau on "Release to Archives of Records in Existence for Thirty Years", Debates (Commons), May 1, 1969, pp. 8199-8200.

47 Cabinet Directive No. 46, "Transfer of Public Records to the Public Archives and Access to Public Records Held by the Public Archives and by Departments".

freedom of information which had been introduced each year since 1969 by Gerald Baldwin, a Conservative Member of Parliament, was also referred to the Committee on Regulations. On February 12, 1976, Parliament adopted unanimously the Committee's report of December 16, 1975, stating that the Committee approved in principle the concept of freedom of information legislation. Parliament than referred the matter back to the Committee. And on July 14, 1977, Parliament passed the Canadian Human Rights Act,[48] first introduced in July 1975. This Act, among other things, grants Canadian citizens a right of access to personal records held by the government and permits them to correct inaccurate or obsolete information.

An important development in the movement towards more openness in Canadian government was the publication in June 1977 of the Government's Green Paper entitled Legislation on Public Access to Government Documents.[49] The Green Paper asserts that "open government is the basis of democracy" and that "effective accountability - the public's judgment of the choices taken by government - depends on knowing the information and options available to decision-makers". The Green Paper then emphasizes the need to preserve ministerial responsibility and political neutrality and notes that "legislation on public access to government documents must be undertaken as an evolutionary development

48 Canada, Statutes, 1976-1977, c. 33.

49 Honourable John Roberts, Secretary of State, Legislation on Public Access to Government Documents, Ottawa, Minister of Supply and Services, 1977, p. 1.

within our constitutional traditions".[50] The remainder of the Paper contains a brief but quite comprehensive examination of the possible consequences for government of enacting freedom of information legislation. The Green Paper was referred to the Standing Joint Committee on Regulations which submitted its recommendations on the Paper to Parliament on June 28, 1978.[51]

Active interest in freedom of information legislation has been manifested in several Canadian provinces in the form of government-sponsored bills, private members bills or white papers tabled in the legislature. Only the Governments of Nova Scotia and New Brunswick, however, had at the date of writing enacted freedom of information statutes.[52] These Acts are of particular interest because they constitute the first freedom of information legislation enacted in Westminster-style parliamentary systems. Further reference to these Acts will be made later in this paper.

This overview of developments and proposals respecting freedom of information legislation in Britain, Australia and Canada demonstrates the pervasive concern in parliamentary systems to formulate legislation which does not encroach unduly on ministerial responsibility. This same concern permeates the discussion in the next two sections of this paper on exemptions and the review process.

50 Ibid., p. 5.

51 Committee on Regulations Respecting Green Paper, Issue no. 34, June 27, 1978.

52 "An Act Respecting Access by the Public to Information on File with the Government", Nova Scotia, Statutes, 1977, ch. 10, and "Right to Information Act", New Brunswick, Statutes, 1978.

Exemptions

The issue of what classes of information should be withheld from the public is a very large one and an appropriate subject for a separate study. Thus this section focusses on those aspects of the issue which bear most directly on the central concern of this paper with ministerial responsibility.

The matter of exemptions is closely tied to the question of review discussed in the next section. The federal Green Paper notes that so far as possible exemptions in freedom of information legislation should be "(i) consistent with and confined to the genuine need for confidentiality in the governing process; (ii) clear; (iii) few in number".[53] However, judgments on the number of exemptions considered desirable and on what constitutes clarity and a genuine need for confidentiality depend to a large extent on the method adopted to review complaints about non-disclosure. If ministers make the final decision as to whether a particular document falls into an exempted category, they may approve legislation providing for a small number of specific exemptions. If a person or body independent of ministers makes the final decision on exemptions, ministers may only support legislation which contains a large number of specific exemptions or a smaller number of very broad exemptions. Thus, decisions on the exemptions to be included in the legislation should be taken in

53 Legislation on Public Access to Government Documents, p. 9.

relation to the review mechanism that will be adopted.

Freedom of information legislation in Sweden, the United States and New Brunswick and the Australian bill are based on the principle that all documents must be disclosed unless they are specifically exempted from disclosure. Similarly, the federal Green Paper supports the principle of "open access subject to specified exemptions". In contrast, the Nova Scotia Act describes types of information that may be disclosed subject to a list of specific exemptions.

There is much agreement from one governmental jurisdiction to another that certain types of information should be kept secret (e.g. documents relating to national defence and security, personal information on individual citizens, trade secrets and financial or commercial information of a confidential nature and records on criminal investigations). There is, however, considerable variation among governments in the comprehensiveness of the exclusions within the different classes of information. Exemptions may be stated so as to restrict access according to the subject matter of the information (e.g. secret information on national security and foreign relations) or according to the consequences of releasing certain information (e.g. documents which should be withheld in the interests of national security and foreign relations). A list which includes exemptions stated according to both subject matter and consequences may also be utilized. The consequences approach permits the exercise of judgment in deciding what information should be disclosed. This more flexible approach requires those persons administering the exemptions

sections of freedom of information legislation to balance contending special interests to achieve the broader public interest. They must weigh the comparative benefits of releasing and withholding specific documents. A document which is clearly secret under the subject matter approach may be released under the consequences approach on the grounds that the public interest argument for disclosure outweighs the arguments of other interests for secrecy.

The nine exemptions proposed in the Green Paper are expressed in terms of the consequences of disclosure. Since these exemptions have been drafted for application in a parliamentary-Cabinet system of government in the Canadian context, they are especially relevant to the Ontario situation. Thus, the Green Paper list of exemptions will be utilized here as a basis for discussing the implications for ministerial responsibility of the selection and wording of the exemptions.

The exemptions proposed in the Green Paper are as follows:

> "those documents, the disclosure of which, or the release of information in which might
>
> (i) be injurious to international relations, national defence or security or federal-provincial relations;
>
> (ii) disclose a confidence of the Queen's Privy Council of Canada;
>
> (iii) disclose information obtained or prepared by any government institution or part of a government institution, that is any investigative body:
>
> a) in relation to national security,
> b) in the course of investigations pertaining to the

detection or suppression of crime generally, or
c) in the course of investigations pertaining to the administration or enforcement of any Act of Parliament;

(iv) disclose personal information as defined in Part IV of the Canadian Human Rights Act or threaten the safety of any individual or disclose correspondence between a member of the public and a Member of Parliament or the government;

(v) impede the functioning of, or the examination of a case or issue before, a court of law, a quasi-judicial board, commission or other tribunal, or any inquiry established under the Inquiries Act;

(vi) disclose legal opinions or advice provided to a government institution or privileged communications between lawyer and client in a matter of government business;

(vii) disclose financial or commercial information which:

a) would jeopardize the position of a government institution in relation to contractual or other negotiations or the position of any other party to such negotiations, or
b) would result in significant and undue financial loss or gain by a person, group, organization or government institution, or
c) would affect adversely a person, group, organization or government institution in regard to its competitive position."

The Green Paper notes that two additional exemptions would be needed. One of these exemptions (number viii) "would attempt to preserve the fullness and frankness of advice serving the decision-making process, particularly in relation to advice to or by Ministers, deputy heads, and senior officials, to preparation of legislation, or to the conduct of parliamentary business". The other exemption (number ix) would forbid the release of documents the disclosure of which is prohibited

by any federal enactment.[54]

Only the exemptions numbered (ii) and (viii) are discussed here because these exemptions are most directly pertinent to the issue of freedom of information and ministerial responsibility.

The need to maintain the confidentiality of Cabinet documents is generally acknowledged not only in parliamentary-Cabinet systems of government in Commonwealth countries but also in the Scandinavian countries of Sweden,[55] Norway[56] and Denmark.[57]

The argument for the confidentiality of Cabinet deliberations in relation to collective ministerial responsibility was expressed well by the Franks Committee in Britain:

> "The Cabinet works on the doctrine of collective responsibility. Whatever the individual views of its members, when the Cabinet reaches a decision it is the decision of them all. Each shares in the collective responsibility for that decision... Privacy for the internal deliberations of the Cabinet... is an essential condition of this collective unity. Cabinet Ministers must be able to discuss matters with their colleagues in an uninhibited way."[58]

54 Ibid., pp. 10-11

55 Sweden, Law on Curtailment of the Right to Demand Official Documents, sec. 1.

56 Norway, Law on Publicity in Administration, sec. 5(2).

57 Denmark, Law on Publicity in Administration, sec. 5(1).

58 Report of Departmental Committee on Section 2 of The Official Secrets Act, 1911, Cmnd. 5104, para. 183. See also Report of the Committee of Privy Councillors on Ministerial Memoirs (the Radcliffe Committee), Cmnd. 6386, espec. paras. 33, 50-51.

It is significant also that the Australian Interdepartmental Committee Reports of 1974 and 1976 both recommend that information on the deliberations of Cabinet or Cabinet committees not be disclosed, and that this recommendation is followed in the 1978 Freedom of Information bill. Neither the Nova Scotia nor the New Brunswick Acts make specific reference to Cabinet deliberations or decisions but they do prohibit the release of information that would disclose opinions or recommendations by public servants in matters for decision by a Minister or the Executive Council.[59]

While there is agreement in parliamentary-Cabinet governments that the confidentiality of documents revealing Cabinet deliberations must be preserved, ministers could decide to release the whole of certain documents and portions of others. A freedom of information act could take a permissive rather than a mandatory approach towards the release of all government information, including Cabinet documents. Indeed, the Green Paper recommends the inclusion of a general provision that despite the exemptions "the Minister may order the release of any document where in his opinion it is in the public interest to do so".[60] Moreover, the non-exempt sections of documents containing a mixture of exempt and non-exempt material could be released. The Swedish, Nova Scotia and New Brunswick Acts and the Australian bill provide for the release of the non-exempt portions of the partially exempt documents.

59 Nova Scotia, sec. 4(h); New Brunswick, sec. 6(g).

60 Legislation on Public Access to Government Documents, p. 11.

The United States Act requires the release of "reasonably segregable" parts of documents.

The segregation of exempt from non-exempt portions of documents will in some cases be a costly and time-consuming task, especially where an effort is made to separate factual and analytical material from opinion. Nevertheless, even in the absence of legislation, the federal government in Canada has made a modest beginning in this direction. In 1977, the Privy Council Office set up a new system relating to Cabinet documents. Factual information and policy options are contained in one part called a discussion paper whereas the recommendations of public servants and political considerations are contained in a second part so that the discussion paper can be released when the Cabinet's decision has been announced. To date, only a few ministers have decided to release certain discussion papers.

The Green Paper's exemption (viii) poses very difficult problems of phrasing and interpretation. The wording and administration of this exemption are likely to affect significantly the state of both ministerial responsibility and political neutrality. The Green Paper views this exemption as the most problematic but provides little elaboration on the nature and possible resolution of the problems.

The policies or proposals of Sweden, the United States, Australia, Nova Scotia and New Brunswick, provide, in varying degrees, for the exemption of advice relating to the decision-making process. The 1976 Australian Interdepartmental Committee, which referred to this class of information

as internal working documents, recommended the withholding of documents containing material in the form of opinion, advice or recommendation or other material "reflecting deliberative or policy-making processes".[61]

The Australian bill exempts documents the disclosure of which

> a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
>
> b) would be contrary to the public interest.[62]

The Nova Scotia Act exempts information which "would be likely to disclose opinions or recommendations by public servants in matters for decision by a Minister of the Executive Council".[63] The Act also exempts information which "would be likely to disclose draft legislation or regulations".[64] The New Brunswick Act exempts information which "would disclose opinions or recommendations by public servants for a Minister or the Executive Council" or which "would disclose the substance of proposed legislation or regulations".[65]

61 Ibid., p. 44.

62 Sec. 26(1).

63 Sec. 4(h).

64 Sec. 4(g).

65 Secs. 6(g) and (h).

The exemption of material relating to "advice serving the decision-making process" could throw a blanket of secrecy over a very large amount of government information. The Australian proposal demonstrates that in a parliamentary-Cabinet system such an exemption could apply to communications between ministers, between ministers and public servants, between public servants, and between ministers or public servants on the one hand and non-governmental advisors on the other. Yet it is access to precisely these types of material which is most eagerly sought by members of the public, especially by journalists and academic scholars.

It is easy to understand why ministers and senior public servants do not share the enthusiasm of persons outside government for freedom of information legislation in general and for access to material on the decision-making process in particular. The relase of information revealing ministerial and public service contributions to and debates over policy has important implications for both ministerial responsibility and political neutrality. Documents which disclose disagreement among ministers or between ministers and public servants could be exploited by the government's opponents to the political disadvantage of the ministers. It is natural that ministers should not want to answer to the legislature and the public for the content of documents which are likely to be controversial and which could be kept secret. Ministers do not deliberately seek trouble. Similarly, senior public servants generally resist the expansion of public access to official documents which lay bare their personal views and values

on policy issues. If public servants are drawn into public debate over their contributions to policy development, their anonymity will decline. Moreover, to the extent that their written advice is at odds with their minister's decision, both ministers and public servants may be publicly embarrassed. Ministers may strive to avoid such situations by surrounding themselves with political appointees or with yes-men. Both the frankness and the completeness of departmental advice will thereby be threatened. Also the security of tenure associated with a career in the public service will be undermined.

It is a serious error, however, to exaggerate the impact of more open government on the doctrines of ministerial responsibility and political neutrality. The gradual evolution of these doctrines that has already occurred has been explained earlier in this paper. The implementation of effective freedom of information legislation would require further evolution of these doctrines; it would not require their drastic alteration or their abandonment.

The utility of freedom of information legislation depends to a very large extent on the access it grants to information on the factual and analytical bases for public policy decisions. Thus, the wording and interpretation of an exemption relating to documents on the decision-making process in government are crucial to the legislation's effectiveness and acceptability. The difficulty of phrasing this exemption in precise, comprehensive and brief wording means that it will require careful and continuous exercise of judgment as to its

proper application. In varying degrees, this same consideration applies to the other exemptions as well. Therefore, the issue as to what review mechanism is established as the final recourse on disclosure is a critical one.

The Review Process

A central aspect of the administration of freedom of information legislation is the application of the exemption provisions to requests for access to government documents. This task is performed initially by public servants. However, instances will arise where citizens wish to appeal to a higher authority against a public servant's decision to deny access to all or part of certain documents. Thus the legislation must provide a review process which specifies the person or persons with authority to review the decisions of public servants. The main issue in the formation of the review process is what individual or body should have final authority to review and, where appropriate, to overrule decisions to withhold information.

The nature of the review process varies among those governmental jurisdictions with public access legislation (e.g. Sweden, the United States, New Brunswick, Nova Scotia). The matter is, however, particularly problematic and contentious in Commonwealth parliamentary systems because of the doctrines of ministerial responsibility and political neutrality. While the debate over the review process has significant legal,

constitutional and administrative implications, the issue is in large part a political one. Ministers prefer to retain final authority over the release of official documents so as to avoid political embarrassment to themselves or to the government as a whole. As noted in earlier discussion of exemptions relating to advice serving the decision-making process, the release of certain information could have disagreeable consequences for both ministers and public servants. The Green Paper acknowledges this problem in its statement that "the arguments in favour of a review process, outside direct ministerial authority, derive from the concern that both Ministers and officials may have an interest in applying with undue restriction obligations regarding the release of government documents".[66]

Thus, ministers and public servants tend to favour a review process in which ministers have ultimate authority to decide whether a particular document will be released. However, many individuals and groups, including in Canada both government and Opposition legislators, support a review mechanism which allows ministerial decisions on access to be overruled. The Green Paper notes that the ideal review process should be characterized not only by speed, efficiency and minimal cost but also by public credibility and consistency with ministerial

66 Legislation on Public Access to Government Documents, p. 15.

responsibility.[67] The difficulty facing the drafters of public access legislation is that the latter two attributes may be mutually incompatible. The major task is to devise a review mechanism which will satisfy the public but which will not infringe unduly on ministerial responsibility.

A variety of review procedures for freedom of information legislation has been adopted or proposed. The Swedish and United States procedures were briefly described earlier. In parliamentary governments, a distinction may be made between two major categories of review mechanism:

1) those which confer final authority on a minister, and

2) those which bestow final authority on a person, body or institution other than a minister.

The Green Paper's examination of the virtues and limitations of five alternative mechanisms is directly relevant to the Ontario situation. In addition to an evaluation of these five options, this section will provide an assessment of the utility of the office of the Ombudsman in the review process. Thus consideration will be given in turn to the following review mechanisms: the legislature, an Information

67 Ibid., p. 16.

Auditor, an Information Commission with advisory powers, an Ombudsman, an Information Commissioner with powers to order release, and judicial review.

Use of legislative review as an appeal procedure would involve little or no change from the present situation. Persons who are refused access to official documents could present a complaint to a member of the legislature who could in turn present the grievance to the legislature as a whole. The legislator would utilize the same range of techniques available to review the administration of other statutes (e.g. questions, debates, committee meetings).

Few commentators on open government treat legislative review as a desirable means of providing an appeal against public service or ministerial decisions to withhold information. In a majority government situation, a legislator is likely to have little success in persuading the government to reverse a decision on disclosure. Even the Green Paper which sees some virtue in legislative review, in part because it would not encroach on ministerial responsibility, gives this mechanism a generally negative assessment. The Green Paper notes that parliamentary review "would seem to provide little or no reliable means of speedy recourse" and could take up valuable parliamentary time.[68]

68 Ibid., p. 16.

Nevertheless, the Nova Scotia Freedom of Information Act[69] provides for review by the House of Assembly. The reasons for choosing this appeal procedure have been explained by Nova Scotia's Legislative Counsel as follows:

> "... it was necessary... to select between the courts, a person established by statute, for example, the Ombudsman, or finally the House of Assembly itself. It was generally felt that appeals to the Court for the information were inappropriate since in those cases where information might be denied it would be primarily a political matter. The result would be involving the Courts in political controversy and also increasing the burdens now upon the Courts... it was generally felt that it would be inappropriate for an appointed official to be sitting in judgment upon an elected official... particularly where that elected official would be one of the persons who would participate in the appointment of the other person. In the final analysis it was thought that the best forum to have the decisions of the Minister questioned would be in the House of Assembly itself. Here the decision of an elected official to deny information would be ruled upon by other elected officials, with the arguments, for and against the decision, being made in the open, with the maximum opportunity possible for scrutiny by the public..."[70]

69 Nova Scotia, Statutes, 1977, c.10. Section 13 provides that "(1) Where a request for information has been denied by the Deputy Head and an appeal of that denial made to the Minister and the Minister has upheld that denial, the person to whom the information is denied may appeal to the House of Assembly. (2) The appeal to the House of Assembly shall be presented by a member thereof making a motion in accordance with the Rules and Forms of Procedure of the House of Assembly for access by the person requesting the information to the information requested and the motion shall be dealt with by the House in accordance with its said Rules and Forms of Procedure."

70 Quoted in H. Allan Leal, "Notes for a Submission", p. 6.

The appointment by the legislature of an Information Auditor who would receive complaints about the withholding of documents would also preserve final authority in the review process for the minister. The Auditor would be authorized to inspect documents to which access had been denied and would present an annual report to the legislature on whether the denials had been legitimate. It is unlikely that this mechanism would be palatable to the public since the response to the complaint would not be prompt and would not necessarily result in a reversal of the minister's decision.

A slight modification of this mechanism suggested in the Green Paper is that the Information Auditor be given a "roving right of review" similar to that exercised by federal and provincial auditors general. Under this procedure, the Information Auditor could examine departmental administration of the freedom of information act without having received a specific complaint.

An Information Commissioner with advisory powers could be appointed to inquire into complaints about non-disclosure, to scrutinize the documents involved and to make a prompt report to the complainant which the government would not be obligated to accept. This procedure, which would not infringe on ministerial responsibility and which would enjoy a greater measure of public credibility than that of the Information Auditor, is the option favoured by the federal government in the Green Paper.

The strength of the proposal lies in the fact that the news media and Opposition parties could put pressure on the minister to reverse his decision by publicizing those reports where the Commissioner disagrees with the minister's decision. According to critics of the proposal, its weakness lies in the fact that the minister still has the final word on disclosure and on most occasions is likely to "tough it out" by sticking to his original decision to deny access.

There is little support outside government for the appointment of an Information Commissioner with merely advisory powers. However, two notable variations of this model have been suggested.

One proposal[71] is that in addition to the functions described above, the Commissioner could negotiate an agreement between the complainant and the minister. Also, even in the absence of complaints about denial of access to certain documents, the Commissioner could take the initiative by chiding departments for not making those documents public. The Commissioner would not have authority to overrule ministerial decisions but his or her influence would be enhanced by permitting the Commissioner to report to a special legislative committee when agreement with a minister cannot be reached. The committee would be chaired by an Opposition member, would be composed of a majority of

71 See submission of the Parliamentary Press Gallery to the Committee on Regulations Respecting Green Paper, Issue no. 14, March 7, 1978, pp. 14A:16-19.

Opposition members, would meet in camera to examine the documents in question and would report to the legislature. It has been suggested that this procedure would deter a minister from withholding documents so as to avoid political embarrassment.

The second proposal[72] is a two-tier review mechanism. The Information Commissioner would investigate complaints and report his or her findings directly to the legislature. The report would also be made available to the complainant, to the department involved and to a second level of appeal. If the dispute could not be resolved at the level of the Commissioner, judicial review could be carried out by the Supreme Court which would have authority to reverse ministers' decisions to refuse access. This mechanism is examined at greater length in the discussion of judicial review later in this section.

Several proponents of freedom of information legislation have proposed that the Office of the Ombudsman serve as a review mechanism either by itself or in company with the possibility of further review by a second body. The Ombudsman would operate much like the Information Commissioner already discussed except that the review of government decisions on access to information would be added to the Ombudsman's regular duties. Like the Information Commissioner, the Ombudsman could act as the first stage in a two-stage review process. Alternatively, complaints could be directed as in Sweden either to the Ombudsman or

72 See submission of the Canadian Labour Congress, Ibid., Issue no. 18, March 21, 1978, pp. 18A: 22-23.

to another appeal body.

In Ontario, use of the Office of the Ombudsman would be convenient since, unlike the federal sphere, Ontario already has an Ombudsman. Moreover, the Ombudsman tends to be highly credible in the eyes of the public and would not trespass on ministerial responsibility in the sense of having authority to override ministerial decisions. Indeed, the federal Committee on the Ombudsman asserted that

> "... it must be remembered that the powers of ombudsmen are restricted to reporting. They cannot change matters themselves. Given this absence of executive authority in an ombudsman, the Committee found it difficult to identify any basic conflict between the doctrine of ministerial responsibility and the concept of the ombudsman." 73

There is considerable debate, however, as to whether the Ombudsman's Office could or should handle the additional burden of inquiring into the validity of public service and ministerial decisions on public access to official information. It is debatable also whether this task is in keeping with the duties normally performed by an Ombudsman since it involves interpretation of exemptions contained in an act of the legislature rather than investigation of complaints about bureaucratic abuse of powers. Some opponents to utilizing the Ombudsman as a review mechanism contend that since legal interpretation is involved, the task should be discharged by a judge.

73 Report of the Committee on the Concept of the Ombudsman, p. 17.

Each of the review procedures discussed to this point retains final authority over the release of government documents for the minister. The proposal to appoint an Information Commissioner with powers to order release would confer that authority on a person independent of the minister. This arrangement would receive strong public support because the Commissioner could reverse ministerial decisions to deny access. Ministers would have no guarantee that the Commissioner would interpret the exemption provisions of freedom of information legislation so as to withhold documents which might be politically embarrassing. In the federal Green Paper, the government opposes this mechanism on the grounds that it would infringe on the doctrine of ministerial responsibility. It is notable that this mechanism has little support even among those advocates of public access legislation who minimize the relevance of ministerial responsibility to the freedom of information issue. Most persons who are willing to have ministerial decisions reversed by an independent review mechanism favour judicial review.

Before discussing judicial review, it is worth noting that the functions of the Information Commissioner, with or without powers to order the release of documents, could be performed by an Information Commission composed of three persons. Among the possible benefits of this approach would be the mix of values, expertise and experience which the Commissioners would bring to their work and the opportunity to speed up decisions by delegating the less difficult cases to one of the three Commissioners.

Most proponents of freedom of information legislation favour judicial review of ministerial decisions on public access to government documents. Their preference can be explained in part by the experience of Sweden and the United States with review by the courts. Moreover, Canadian discussions of the appropriate review process are pervaded by a widespread lack of confidence in the willingness of ministers to permit adequate access to official information. For example, the brief of the Canadian Association of University Teachers to the federal Committee on Regulations states that

> "It has been demonstrated time and time again that governments will resort to all types of subterfuge in order to avoid having to release anything which may be damaging to their political image. The current procedure which allows a minister absolute discretion on the release of a document contravenes one of the basic tenets of the rule of law - that no one should be a judge in his own case - and its entrenchment in a Freedom of Information Act would merely lead to public scepticism and disaffection."[74]

It is evident also that a freedom of information act which permits citizens to appeal to the courts would inspire a high measure of public confidence in the act.

Despite these arguments for judicial review, virtually all ministers and public servants who have discussed the issue in public are opposed to the use of this mechanism. The rationale for Nova Scotia's

74 Committee on Regulations Respecting Green Paper, Issue no. 16, March 14, 1978, p. 16A:47.

rejection of judicial review was explained in the earlier discussion of legislative review. In the Green Paper, the federal government criticizes the proposal for judicial review by the Federal Court much more vigorously than the other review mechanisms. The government's reasoning is as follows:

> "The role of the judge is the impartial arbitrator... To require that he become a judge of a Minister's actions, that he should have the power to replace the opinion of the Minister with his own opinion, is to change his role entirely and to bring him into the political arena where he cannot properly defend himself. All of this could seriously threaten the independence of the courts and thereby place in jeopardy our present judicial system.
>
> Under our current conventions, it is the Minister who must remain responsible for deciding whether to refuse or grant access to documents and this responsibility is a constitutional one owed to his Cabinet colleagues, to Parliament, and ultimately to the electorate... There is no way that a judicial officer can be properly made aware of all the political, economic, social and security factors that may have led to the decision in issue. Nor should the courts be allowed to usurp the constitutional role that Parliament plays in making a Minister answerable to it for his actions." [75]

The Green Paper also cites two practical objections to judicial review, namely that the heavy burden of public access cases might delay the courts' work and that the cost to the complainant of an appeal to the courts would be very high.

75 Legislation on Public Access to Government Documents, pp. 17-18.

The Green Paper statements quoted above, both in respect to ministerial responsibility and to the proper role of judges, have been subjected to a severe assault, especially by academic scholars and practitioners of the law.[76] The Canadian Bar Association agrees with Professor Murray Rankin's conclusion that "no constitutional, legal or practical impediment stands in the way of judicial involvement in the adjudication of freedom of information questions, and that the defence of ministerial responsibility is a time-worn dogma..."[77] This conclusion does not, however, take account of the political obstacles to judicial involvement. If ministers perceive that judicial review may prove to be politically damaging to them, they may oppose this mechanism despite the absence of other impediments. Similarly, public servants may resist judicial review or any other mechanism which may lead to a diminution in their political neutrality or anonymity. Moreover, recent legal analyses of ministerial responsibility tend to be based on the narrow and inadequate interpretation of the doctrine described in the first section of this paper.

76 See, for example, T. Murray Rankin, Freedom of Information in Canada: Will the Doors Stay Shut?, Canadian Bar Association, 1977; the submission of the Canadian Bar Association to the Committee on Regulations Respecting Green Paper, Issue no. 19, April 4, 1978, pp. 19A:1-31; and Ronald G. Atkey, "Freedom of Information: The Problem of Confidentiality in Relation to the Administrative Process", a paper presented to the Conference on Administrative Justice, Faculty of Law (Common), University of Ottawa, January 27, 1978.

77 Submission of the Canadian Bar Association, p. 19A:16.

Lawyers and law professors have been especially forceful in their rejection of the Green Paper's statement on the appropriate role of judges. Professor Rankin contends that the assertion that a judge cannot be made aware of all the considerations that may have led to a ministerial decision to withhold a document must be founded on one of two assumptions:

> "Either the evidence or arguments that a Minister can advance to support non-disclosure are so insubstantial or ephemeral that he could never hope to persuade an independent person of their worth, or; alternatively, a judge lacks the intelligence or capacity to understand the evidence or arguments and to give them appropriate weight. That either argument could be seriously advanced by a present day government is eloquent evidence of its determination to avoid any meaningful legislation on the subject." [78]

Efforts have been made to find an acceptable compromise between the advocates and the opponents of judicial review by proposing a two-tier mechanism. As noted earlier, the inquiry and conciliation functions of an Ombudsman or an Information Commissioner with advisory powers could be followed if necessary by judicial review. In New Brunswick, the decision of a minister to deny access to information may be appealed to either the Supreme Court or the Ombudsman. Once a person has appealed to the Court, he or she may not refer the matter to the Ombudsman. However, if a complainant is not satisfied with an appeal to the Ombudsman, he or she may then appeal to the Court. The Court can order the minister to make the requested information available, in whole or in part. The Ombudsman can only recommend that the minister release the

78 Rankin, Freedom of Information in Canada, p. 145.

information in question. At the federal level of government, the Standing Joint Committee on Regulations recommended in June, 1978 a two-tier review mechanism consisting of an Information Commissioner and the Federal Court.[79] The Commissioner would investigate complaints about the withholding of information and would advise the relevant minister or public servant and the complainant as to whether the information should be released. The Committee, on the basis of its conclusion that "it is not the proper role of a Minister to make the final decision as to whether a requested document is covered by one of the exemptions",[80] proposed that a complainant who is unhappy with the result of the Commissioner's work have the right of appeal to the Trial Division of the Federal Court and then if necessary to the Federal Court of Appeal and, with leave, to the Supreme Court of Canada.

Variations of the judicial review process have also been proposed. For example, provision could be made for 1) in camera review by a court without written decision of documents in such categories as national security, defence and Cabinet matters and 2) in camera review by a court with written decision of documents in such categories as internal working papers, law enforcement investigations and trade secrets.[81]

79 Committee on Regulations Respecting Green Paper, Issue no. 34, June 27, 1978.

80 Ibid., 34:9.

81 See for example the submission by ACCESS to Committee on Regulations Respecting Green Paper, Issue no. 12, February 28, 1978, pp. 12A:7 and submission by the Canadian Association of University Teachers to the Committee, Issue no. 16, March 14, 1978, pp. 16A:31-32.

The review mechanism proposed in the Australian bill provides yet another model for parliamentary-Cabinet systems of government. The predominant concern of the government for the preservation of ministerial responsibility explains in large part its approach to the review process. The Explanatory Memorandum accompanying the bill notes that the bill "has been drafted in the context of a Westminster-style system of government"[82] with the result that Cabinet and Executive Council proceedings are exempted from disclosure and that ministers and their officials are given final authority to decide whether information relating to vital national interests and internal working documents should be released. The Memorandum states further that "in these important matters, the Bill preserves the proper role of Ministers and their officials. It does not move authority from the elected Government to non-elected courts and tribunals".[83]

The content of the bill follows closely the recommendations contained in the 1976 Report of the Interdepartmental Committee. Subject to some very important exceptions, appeals against denial of access may be made to the Administrative Appeals Tribunal which was established in 1975 with jurisdiction to review administrative decisions. If the Tribunal finds that a document falls within one of the several exemptions set out in the bill, it cannot review a discretion to deny access to

82 Freedom of Information Bill 1978, Explanatory Memorandum, The Parliament of the Commonwealth of Australia, The Senate, 1978, p. ii.

83 Ibid., p. iii.

that document. Moreover, the minister has final authority over access to documents bearing on national security, defence, international relations, information received in confidence from other governments, Commonwealth-State relations, and Cabinet and Executive Council matters.

When these restrictive provisions were proposed by the Interdepartmental Committee, an Australian authority on freedom of information legislation described the Committee's proposal in this area as "ingenious for its embodiment of the principle of Executive autocracy". He asserted also that the only reasons for maintaining this principle in freedom of information legislation are either that "neutral adjudicators cannot be trusted to interpret a statute and decide whether some documents should be disclosed - a sad reflection on British justice - or that the questions involve political judgments which must be made by the Administration - the very principle that freedom of information is meant to extinguish".[84] Note the striking similarity between this statement and the views of Canadian supporters of judicial review noted above.

All Commonwealth parliamentary governments face the task of reconciling conflicting views on the appropriate review process for public access legislation. Despite the variety of review mechanisms available for adoption or adaptation, differing opinions on the meaning and relevance of the doctrine of ministerial responsibility present a significant obstacle to agreement on a mutually acceptable procedure. Also, it is

84 John McMillan, "Making Government Accountable", The New Zealand Law Journal, July 19, 1977, p. 293.

evident that regardless of the review mechanism that is chosen, the choice will be closely related to the decision on exemptions.

Conclusions

The central importance of the doctrine of ministerial responsibility to the freedom of information issue in Ontario is clear. Discussion in the first part of this paper demonstrated that the narrow interpretation of the doctrine on which many proponents of public access legislation build their case is an inadequate basis for informed analysis of this issue. Nevertheless, the doctrine of ministerial responsibility in its fullest sense and the integrally related doctrine of political neutrality are evolving in a direction which will facilitate the accommodation of such legislation to the Ontario political and administrative systems.

The second part of this paper has shown that in parliamentary governments like that of Ontario the debate over freedom of information legislation focusses to a large extent on exemptions and the review process. The major participants in the debate tend to be ministers and public servants on one side and Opposition legislators and various segments of the public on the other side. There is not, however, a homogeneity of views on either side.

Ministers and public servants who oppose freedom of information legislation or press for a particular content for that legislation usually support their position by reference to the need to preserve

ministerial responsibility and political neutrality. Many advocates of such legislation contend that the ministerial responsibility-political neutrality argument is a bogus or artificial one. They claim further that the real reasons for the opposition of ministers and public servants are potential political or personal embarrassment and administrative inconvenience.

Another widely held view among proponents of freedom of information legislation is that this legislation will gradually bring about a change in the attitude of ministers and public servants towards public access to official information. It is suggested that government officials will become more supportive of open government when they realize that it has more benefits and fewer disadvantages than they anticipated. Experience in Sweden and, more recently, in the United States suggests that this attitudinal change is likely to occur in other jurisdictions, including Ontario. If a freedom of information act is adopted in Ontario, it is essential that the act make provision for continuing review of its operation so that it may be amended to take account of changing attitudes and conditions.

APPENDIX A

NOTICES OF MOTION FOR THE PRODUCTION OF PAPERS

General Principle

To enable Members of Parliament to secure factual information about the operations of government to carry out their parliamentary duties and to make public as much factual information as possible consistent with effective administration, the protection of the security of the state, rights to privacy and other such matters, government papers, documents and consultant reports should be produced on Notice of Motion for the Production of Papers unless falling within the categories outlined below in which case an exemption is to be claimed from production.

Exemptions

The following criteria are to be applied in determining if government papers or documents should be exempt from production:

1) Legal opinions or advice provided for the use of the government.

2) Papers, the release of which would be detrimental to the security of the State.

3) Papers dealing with international relations, the release of which might be detrimental to the future conduct of Canada's foreign relations; (the release of papers received from other countries to be subject to the consent of the originating country).

4) Papers, the release of which might be detrimental to the future conduct of federal-provincial relations or the relations of provinces inter se; (the release of papers received from provinces to be subject to the consent of the originating province).

5) Papers containing information, the release of which could allow or result in direct personal financial gain or loss by a person or a group of persons.

6) Papers reflecting on the personal competence or character of an individual.

7) Papers of a voluminous character or which would require an inordinate cost or length of time to prepare.

8) Papers relating to the business of the Senate.

9) Papers, the release of which would be personally embarrassing to Her Majesty or the Royal Family or official representatives of Her Majesty.

10) Papers relating to negotiations leading up to a contract until the contract has been executed or the negotiations have been concluded.

11) Papers that are excluded from disclosure by statute.

12) Cabinet documents and those documents which include a Privy Council confidence.

13) Any proceedings before a court of justice or a judicial inquiry of any sort.

14) Papers that are private or confidential and not of a public or official character.

15) Internal departmental memoranda.

16) Papers requested, submitted or received in confidence by the government from sources outside the government.

Ministers' Correspondence

Ministers' correspondence of a personal nature, or dealing with constituency or general political matters, should not be identified with government papers and therefore should not be subject to production in the House.

Consultant Studies

In the case of consultant studies, the following guidelines are to be applied:

1) Consultant studies, the nature of which is identifiable and comparable to work that would be done within the Public Service, should be treated as such (the reports and also the terms of reference) when consideration is being given to their release.

2) Consultant studies, the nature of which is identifiable and comparable to the kind of investigation of public policy for which the alternative would be a Royal Commission, should be treated as such and both the terms of reference for such studies and the resulting reports should be produced.

3) Prior to engaging the services of a consultant, Ministers are to decide in which category the study belongs, and in cases of doubt are to seek the advice of their colleagues.

4) Regardless of the decision as to which category (1 or 2 above) the consultant report will belong, the terms of reference and contract for the consultant study are to ensure that the resulting report comprises two or more volumes, one of which is to be the recommendations while the other volume(s) is (are) to be the facts and the analysis of the study. The purpose of this separation is to facilitate the release of the factual and analytical portions (providing that the material is not covered by the exemptions listed above) enabling the recommendations (which, in the case of studies and category 1, would be exempt from production) to be separated for consideration by Ministers.